

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

July 22, 2009

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.:08MD-052  
MAUI

Amend Prior Board Action of September 26, 2008 (D-7), Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. for Walkway, Stairs, Shower Station, Concrete Pier block Remnants and Landscaping purposes, Kaanapali, Maui, Tax Map Keys: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26, 27, 28

BACKGROUND:

The Land Board at its September 26, 2008 meeting, under agenda item D-7, approved staff's recommendation to authorize the issuance of a 65-year, term, non-exclusive easement to Napili Kai, Ltd. for the right, privilege and authority to use, maintain, repair, replace and remove existing walkway, stairs, shower station, concrete pier block remnants and landscaping over, under and across State-owned land. Briefly, Napili Kai, Ltd. is planning to enlarge and improve its existing swimming pool. The County of Maui requires a shoreline certification as part of the Special Management Area Use Permit process. The land surveyor discovered several encroachments. They include sections of a footpath, stairway, wall, concrete pier block remnants and landscaping.

By letter dated May 1, 2006, OCCL based on the information available notes that the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography, after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the DLNR does not consider the subject encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District use Application to cure this matter. The letter further states: the removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 feet wide) and the fact that a major structure is situated directly landward of the encroachment. The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant.

REMARKS:

By letter dated April 15, 2009, the Applicant was notified the one-time consideration for the term, non-exclusive easement was \$118,000. In May 2009, Ms. Nancy Youngren, attorney for Napili Kai, Ltd. contacted Land Division citing several concerns.

1. Napili Kai, Ltd. is being asked to be responsible for encroachments not fronting their property.

Response: Staff reviewed the survey map and checked with County of Maui, Real Property Tax Assessment. Tax map key: (2) 4-2-2:4 is owned by Napili Lani. Tax map key: (2) 4-2-2:5 is owned by Puna Point II. Tax map key: (2) 4-2-2:7 is owned by Puna Point I. Regretfully, during the shoreline certification process, our staff instructed Napili Kai, Ltd. and its private land surveyor to include the encroachments beyond Napili Kai, Ltd. boundaries. Land Divisions' encroachment practice is to have the property owner adjacent to the encroachment either remove the encroachment or obtain an easement from the Department. Therefore, only Easement A and B front the Napili Kai, Ltd. property. It is our understanding Napili Kai, Ltd. does not want to remove the encroachments. This section of the concrete walkway and landscaped area (Easement A and B) are deemed necessary.

Our staff will have to contact the other property owners to resolve the encroachments fronting their properties.

This separation will allow Napili Kai, Ltd. to continue processing their SMA permit for their property.

2. Napili Kai, Ltd. has acted in good faith, relying on the September 22, 1967 letter, therefore the consideration should be waived for Easement A and B.

Response: Staff reviewed the letter and past SMA correspondences provided by Ms. Youngren, and concur that, if the Department had maintenance and liability concerns, it had the opportunity to record the understanding. We are uncertain why an easement was not issued in this instance.

Staff reviewed the contents of Mr. Ferry's September 22, 1967 letter which mentions 'Tax Plat 4-2-02'. Staff believes and checked old tax records, this does not include tax map key: (2) 4-3-2:26, 27, 28 owned by Napili Kai, Ltd. Without a supporting map attached to the September 22, 1967, we can only rely on the obvious. The Department had granted permission to construct 'a footpath along the rocky shore shown on Tax Plat 4-2-02'.

Our conclusion is further supported by research done by the Office of Conservation and Coastal Land (OCCL), as stated in its letter

dated May 1, 2006 to Mr. Paul Mancini. Therefore, paying for the easement consideration still applies.

In the matter of the other property owners' right to a waiver of the easement consideration, that will be addressed only when those dispositions are brought before the Land Board.

Ms. Youngren on behalf of Napili Kai, Ltd. respectfully requests a waiver of consideration or at a minimum, a discounted consideration, based on the fact the encroaching walkway has historic approvals from the county, as evidenced by the 1986 letters. Those historic approvals are a de facto acknowledgment that an easement existed at the time. Therefore, this is not a new easement but is a way of cleaning up the record, and Napili Kai should not have to pay the current appraised value of the easement (even as discounted for the disutility factor).

Staff reviewed Mr. Paul Mancini letter dated April 22, 1986 and Mr. Christopher Hart letter dated May 14, 1986. Mr. Mancini's letter and supporting documents note the existence of the walkway prior to January 1, 1970, the effective date of the Shoreline Setback law. Mr. Hart's letter granted an SMA Minor Permit for the nonconforming sidewalk (walkway), landward of the shoreline and for "any and all additional proposals for work seaward of the certified shoreline shall be submitted to the State of Hawaii Department of Land and Natural Resources for appropriate review and approval." Essentially, both letters confirm the existence of the non-conforming walkway.

Previously, a shoreline determination was approved on February 4, 1985. Napili Kai, Ltd. shoreline was determined to be seaward of the non-conforming walkway. An earlier shoreline determination request was rejected on October 27, 1971 due to insufficient information. Staff notes that the shoreline certification administrative rules were established on December 10, 1988. Encroachments now have to be resolved prior to the Chairperson certifying the shoreline. When encroachments are discovered, Applicants have the opportunity to either remove the encroachment or obtain an easement from the State. Because we could find no evidence the Department authorized the construction of the walkway on State lands we believe there should be no exception or waiver. The walkway is non-conforming. The consideration for the easement should be at fair market, as approved by the Land Board on September 26, 2008.

3. The independent real estate appraiser hired by the Department should have considered a greater discount because of the public's use.

Response: Based on the appraisal report submitted by PGP Valuation Inc. the consideration for Easement A = \$52,026 and Easement B =

\$16,082

In his appraisal report, the appraiser further states: "The disutility factor can range from 0% to 100% based upon the degree of encumbrance of an easement and is typically low for a non-obtrusive easement such as a non-exclusive, underground pipeline and high for an exclusive easement such as an electrical substation. Although the subject easements lie on public land adjacent to the private Napili Kai land, the shoreline walkway and beach shower facilities are not reserved for the exclusive use of the owners and guests of the Napili Kai. Instead, all of the shoreline walkway, the majority of which lie on private land owned by Napili Kai, are enjoyed by the general public as well as the owners and guests of the Napili Kai. If the subject easement areas were reserved exclusively for the use of the owners and guests of Napili Kai no disutility factor would be warranted. However, the subject easements remain public and the benefit of use remains to be enjoyed by all. Considering the public/private use of the subject easement, a disutility factor of 50% is applied."

Staff believes 50% is reasonable and consistent with other access easements issued by the Department.

Furthermore, easements are also subject to arbitration. We strongly recommend this be the method of resolution for Napili Kai, Ltd.

RECOMMENDATION:

That the Board amend its prior action of September 26, 2008, under agenda Item D-7, by:

1. Delete any reference to tax map keys: (2) 4-2-2:seaward of 4, 5, 7.
2. All terms and conditions listed in its September 26, 2008 approval to remain the same.

Respectfully Submitted,



Charlene E. Unoki  
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 26, 2008

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.:08MD-052

MAUI

Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd.  
for Walkway, Stairs, Shower Station, Concrete Pier Block  
Remnants and Landscaping Purposes, Kaanapali, Maui, Tax Map  
Key: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26,  
27, 28.

APPLICANT:

Napili Kai, Ltd., a Hawaii corporation whose business and mailing  
address is 5900 Lower Honoapiilani Road, Lahaina, Maui, 96761.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located seaward of Kaanapali, Lahaina,  
Maui, identified by Tax Map Key: (2) 4-2-2:seaward of 4, 5, 7 and  
4-3-2:seaward of 26, 27, 28, as shown on the attached map labeled  
Exhibit A.

AREA:

4,022 square feet, more or less.

ZONING:

State Land Use District: Urban  
County of Maui CZO: Multifamily

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_\_\_\_\_ NO X

CURRENT USE STATUS:

**EXHIBIT "A"**

D-7

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
September 26, 2008

Unencumbered with encroachments.

CHARACTER OF USE:

Right, privilege and authority to use, maintain, repair, replace and remove existing walkway, stairs, shower station, concrete pier block remnants and landscaping over, under and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

One-time payment to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

EASEMENT TERM:

Sixty-five (65) years

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

During a recent site visit (January 24, 2006), Office of Conservation and Coastal Lands (OCCL) staff observed the subject concrete pier block remnants and determined it appeared to be built before 1974, prior to the enactment of the EIS law and this action is therefore exempt from Ch. 343.

DCCA VERIFICATION:

Place of business registration confirmed:	YES	<u>x</u>	NO	<u>    </u>
Registered business name confirmed:	YES	<u>x</u>	NO	<u>    </u>
Applicant in good standing confirmed:	YES	<u>x</u>	NO	<u>    </u>

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine initial one-time payment; and
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost.

REMARKS:

The Applicant is planning to enlarge and improve its existing swimming pool. The County of Maui requires a shoreline certification as part of the Special Management Area Use Permit process. The land surveyor discovered several encroachments. They include sections of a footpath, stairway, wall, concrete pier block

remnants and landscaping.

By letter dated May 1, 2006, OCCL based on the information available notes that the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography, after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the DLNR does not consider the subject encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District use Application to cure this matter. The letter further states: the removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 feet wide) and the fact that a major structure is situated directly landward of the encroachment. In addition, the applicant provided a letter approval dated Sept. 22, 1967 by BLNR Chairman Jim Perry that permits the construction of the walkway. Public access along the shoreline will be diminished if the subject encroachment is removed.

The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant. (Exhibit B)

In addition, the applicant has requested a non-exclusive easement over the area on which pier block remnants are located seaward of TMK (2)4-3-2: 27. The applicant proposes to keep the area containing the pier block remnants in its existing state. The OCCL, in its letter dated Oct. 16, 2007, noted that removal of these nonconforming structures (constructed in the 1950s) "would not affect the beach resource." The applicant request a non-exclusive easement over the land area containing the pier block remnants, which measures approximately 1,262 square feet in size.

Pursuant to the Board's action of June 28, 2002, under agenda item D-17 which established criteria for imposing fines for encroachments, staff is recommending a fine of \$500 as the subject encroachment is over 100 square feet.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

There are no pertinent issues or concerns.

RECOMMENDATION: That the Board:

1. Impose a \$500 fine for illegal encroachment, under Section 171-6(12).
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26, 27, 28, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands

terminated within the last five (5) years due to non-compliance with such terms and conditions.

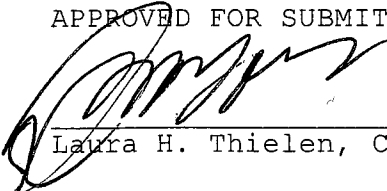
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term, non-exclusive easement to Napili Kai, Ltd. covering the subject area for walkway, stairs, shower station, concrete pier block remnants and landscaping purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;
  - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26, 27, 28, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
  - C. Review and approval by the Department of the Attorney General; and
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
  - E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.

Respectfully Submitted,



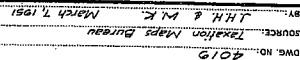
Charlene E. Unoki  
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson

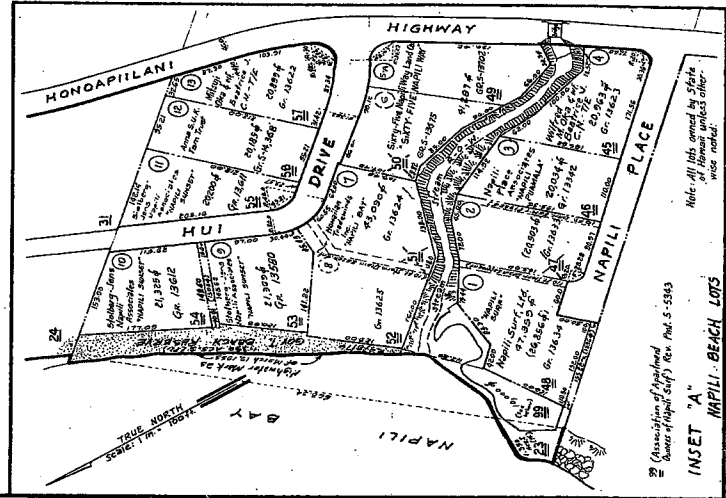
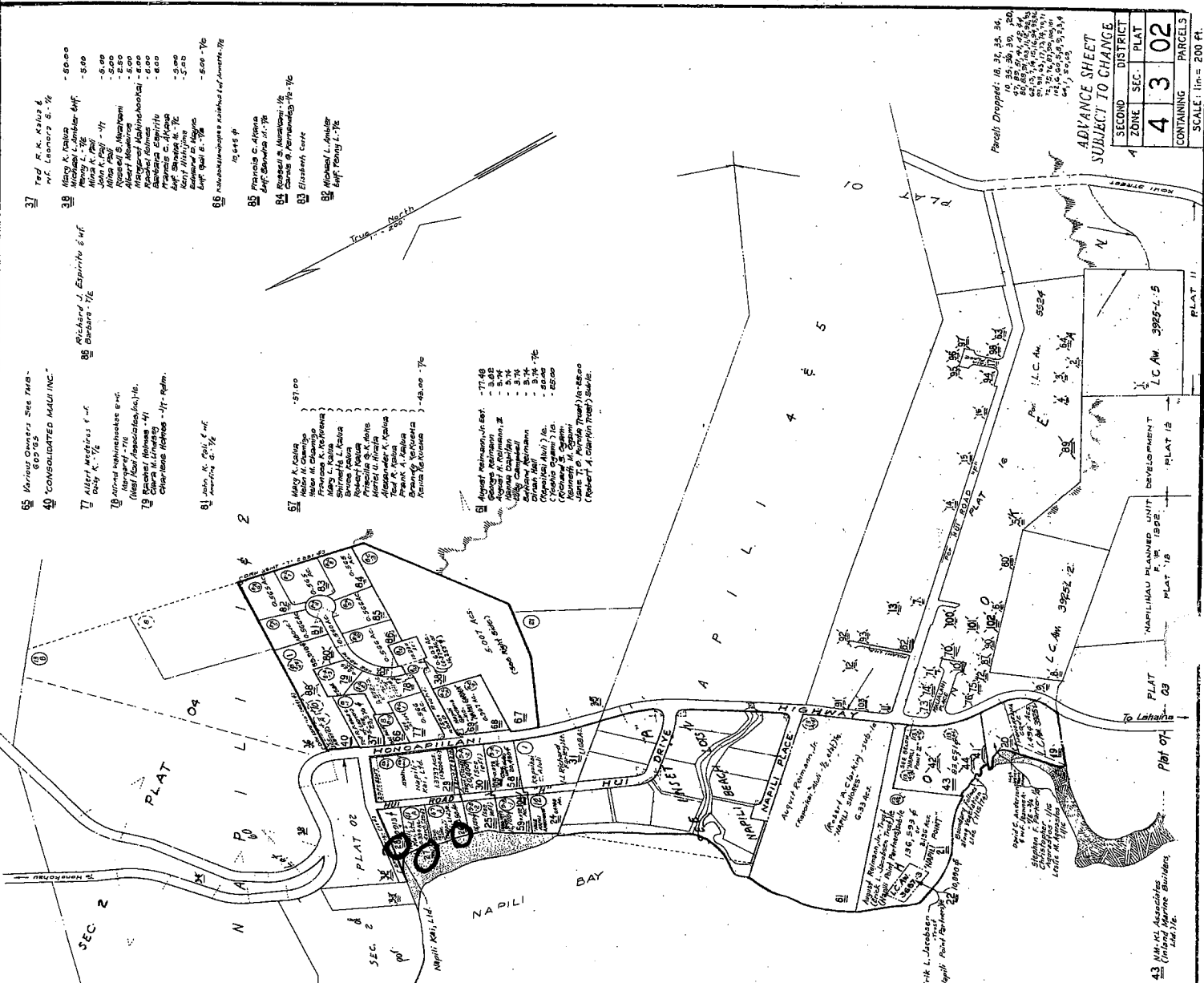




POR. NAPILI 2 & 3, KA'ANAPALI, MAUI.

DEPARTMENT OF THE TAX COMMISSIONER			
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TERRITORY OF HAWAII			
TAX MAP			
SECOND		DIVISION	
ZONE	SEC	PLAT	
4	2	02	
CONTAINING		PARCELS	
SCALE: 1" =		40 FEET	

- Various Owners See Pages 60-65
- 40 "CONSOLIDATED MAUI, INC."
- 77 Albert M. Espinoza, Jr. & Family, Inc.
- 78 West Maui Association, Inc.
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ADVANCE SHEET  
SUBJECT TO CHANGE

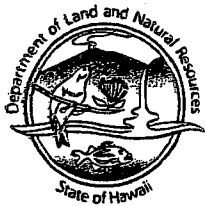
SECOND ZONE	DISTRICT	PLAT	PARCELS
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CONTAINING			

SCALE: 1" = 200' F.

For MA HUI LANDS, KAANAPALI, LAHAINA, MAUI



LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

PETER T. YOUNG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR - LAND

DEAN NAKANO  
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:OCCL:DE

May 1, 2006

Encroachment: MA-06-06

Mr. Paul Mancini  
Mancini Welch & Geiger, LLP  
C/O Napili Kai Beach Resort  
33 Lono Ave. Suite 470A  
Kahului, Hawaii 96732

Dear Mr. Mancini:

Subject: Shoreline Encroachment (Seawall) at the Napili Kai Beach Resort. Lahaina, Maui  
TMK: (2) 4-3-002:028.

The Office of Conservation and Coastal Lands, Department of Land and Natural Resources (DLNR) has reviewed the submitted documentation, carried out a site visit January 24, 2006 and conducted related research to evaluate the environmental impact(s) of granting an easement for the subject encroachment. The encroachment in question is a concrete walkway, stairway and wall, located makai of the property line and within state-owned land and within the Conservation District (Figure 1).

The subject property is located in Napili, West Maui. A survey map by Valera, Inc based on a survey dated February 9, 2005 shows a 1,718 ft<sup>2</sup> portion of the walkway and stairs encroaching onto state land (Figure 2). This survey was not a state certified shoreline but delineates the improvements and the encroaching area. According to the information provided to the DLNR, it is believed the walkway is related to the construction of the Seahorse restaurant which was built in 1972.

The DLNR has determined that the basalt rock revetment to the north of the property is not related to the subject property and thus is not being considered as part of this assessment. Basalt rock fronting the Seahorse restaurant is considered naturally occurring and thus not an encroachment onto state lands. In addition, landscaped areas that were formerly mapped as encroachments have been remapped and the current request for easement is

EXHIBIT "B"

restricted to the concrete walkway, stairs and wall. The landscaped area located landward of the mapped encroaching walkway needs to be resolved the DLNR Land Division since it lies outside of the state Conservation District on unencumbered land (Figure 2).

The DLNR believes that information submitted regarding a BLNR 1967 approval letter for a walkway is related to the adjoining parcel TMK 4-2-2 and not the subject parcel TMK (4-3-2) as noted on the submitted letter (Figure 3). The DLNR has no record of any request for approval of a walkway or easement for the subject TMK. Further investigation reveals the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography. There is evidence that the walkway was built sometime around 1972 in conjunction with the expansion of the Seahouse restaurant.

Based on the information available, it appears the improvements were initiated after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the DLNR does not consider the subject encroachment a Conservation District violation and will NOT be asking for an after-the-fact Conservation District Use Application to cure this matter.

The Board of Land and Natural Resource (BLNR) recently established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the DLNR developed a "Shoreline Encroachment Information Sheet" that is intended to provide the DLNR with additional information to guide the Department's decisions on the disposition of shoreline encroachments. This form has been completed and submitted to the satisfaction of DLNR staff. Based on the information provided the DLNR has made the following determinations with regard to the subject improvements:

#### Surrounding Land Uses:

The surrounding uses are resort, commercial and public with a commercial restaurant immediately landward of the subject encroachment.

#### Beach Resources:

The beach resources are excellent. There is a high value recreational beach and exceptional water conditions and recreational opportunities.

Public Access:

There is direct public access along the shoreline at the site of the subject improvements. There is a public beach access walkway that provides lateral access along the coast that is the subject of this encroachment assessment.

Effect of Removing the Encroachment on:

*Beach Resources:* The removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 ' wide) and the fact that a major structure is situated directly landward of the encroachment. The beach fronting the walkway appears slightly narrow possibly due to chronic or seasonal erosion at the north end. The DLNR has no evidence that the walkway actively interrupts or interferes with littoral process at this time, however it appears the beach system is attempting to migrate landward through wave forcing. The perceived benefits of removal of the walkway would be countered by the removal of well established public access along the shoreline. Since the walkway consists of only a small area and there is significant improvements immediately abutting it, removal of the walkway would not improve beach resources in any meaningful way unless the entire structure including the restaurant were considered for removal.

*Public Access:* Public access along the shoreline will be diminished if the subject encroachment is removed. The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant.

*Affect on Adjacent Properties:* Removal of the improvements would have an unknown effect on the surrounding parcels. The effect of removing the subject improvements would reduce public access and not provide much gain in beach area. A vertical retaining wall (Seahouse restaurant wall) is situated directly landward of the walkway. Removal of the walkway and stairs would have an unknown effect on this structure. It is unknown what the design and structural engineering of the retaining wall is at this time but the walkway may play an important role in securing the retaining wall.

Upon review and careful consideration of the information gathered on this case, staff has determined that allowing the encroachments to remain through the issuance of an easement for the walkway and stairs would have minimal adverse impacts on natural resources, including beach resources and would provide for continued public access. **Therefore, the DLNR has no objections to an easement request being processed.**

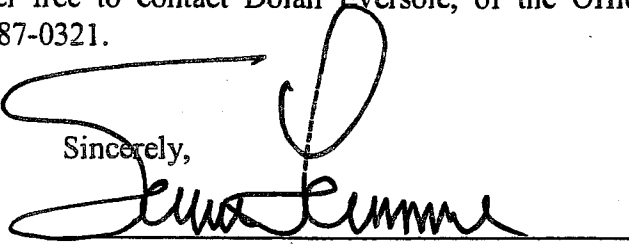
Pursuant to Chapter 171 Hawaii Administrative Rules (HAR), you are required to obtain a land disposition (normally a term easement in these cases) for the use of public lands, and you may be subject to a \$500 fine for the encroachment.

The landscaped area located landward of the mapped walkway may require a revocable permit (RP) from the DLNR Land Division since it lies outside of the state Conservation District on unencumbered land.

Please contact the DLNR, Land Division Maui District office at (808) 984-8103 regarding the processing of an easement and RP. If you do not pursue an easement, you will be required to remove the encroachment.

We hope this letter helps resolve some of the outstanding issues regarding this property. If you have any questions, please feel free to contact Dolan Eversole, of the Office of Conservation and Coastal Lands at 587-0321.

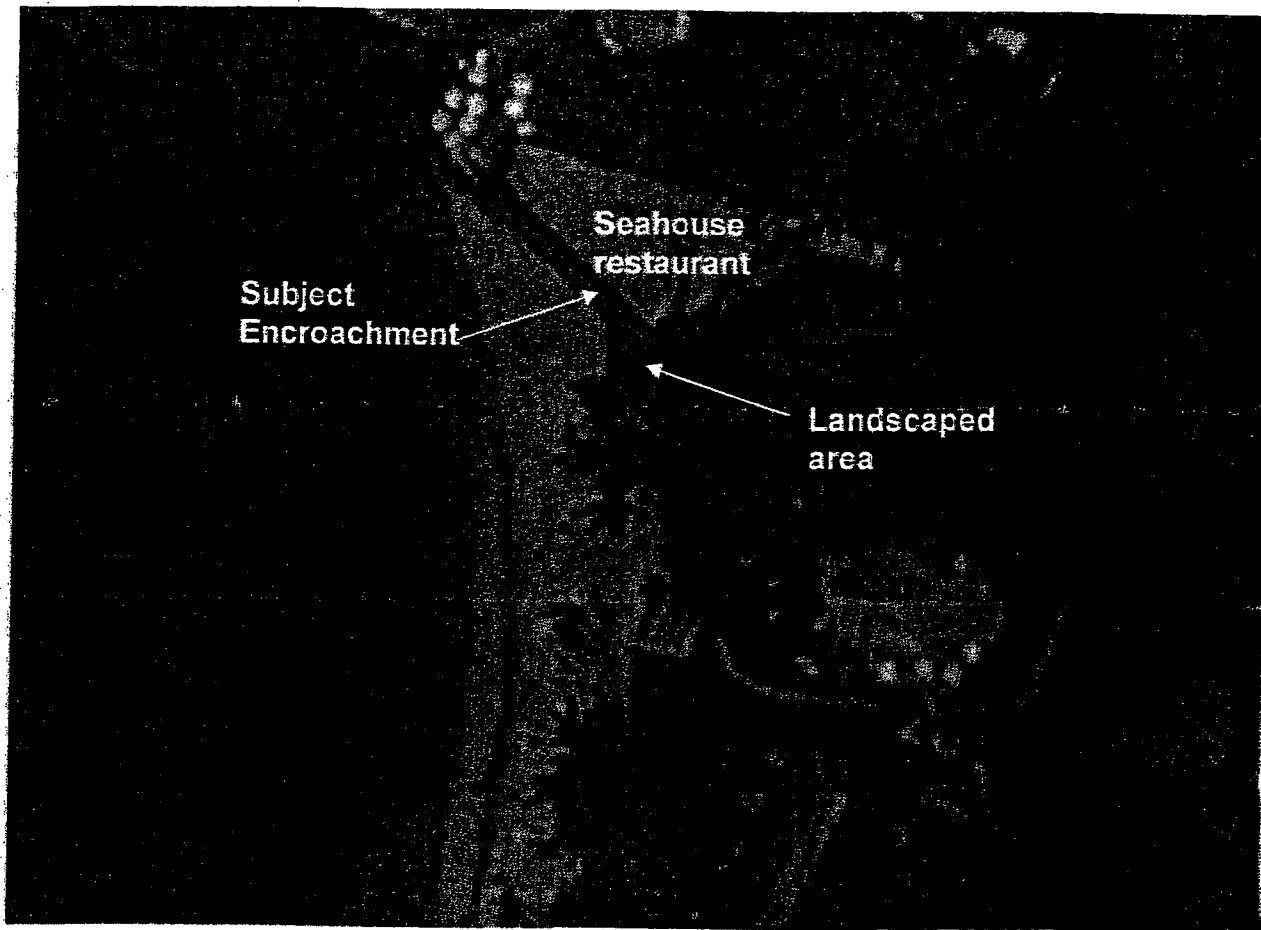
Sincerely,

A handwritten signature in black ink, appearing to read "Sam Lemmo", written over a horizontal line.

Sam Lemmo, Administrator  
Office of Conservation and Coastal Lands

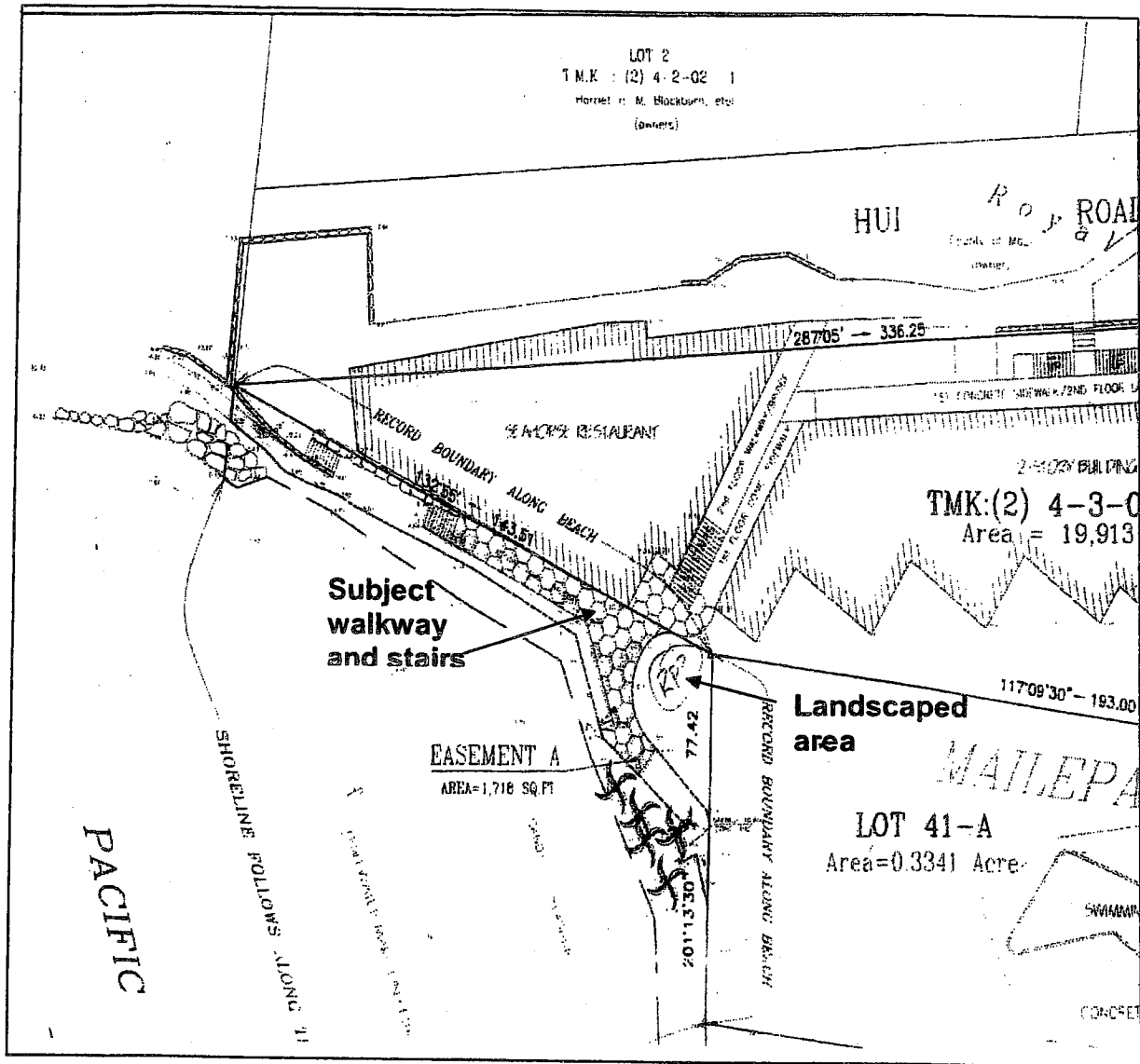
Cc: Maui Board Member  
Maui Land Agent  
Land Division  
Chairperson's Office  
Maui County Planning Department- Thorne Abbott  
Andrew Nelson Frampton and Ward, LLC. 2073 Wells St. Ste 101 Wailuku, HI. 96793

**Figure 1. Site Photographs**



Shoreline Encroachment Napili Kai Beach Resort, Maui (2) -4-3-002:028.

**Figure 2. Survey Map**



Shoreline Encroachment Napili Kai Beach Resort, Maui (2) -4-3-002:028.

### Figure 3. BLNR Letter

JOHN A. BURNS  
GOVERNOR OF HAWAII



DIVISIONS:  
CONSERVATION  
FISH AND GAME  
FORESTRY  
LAND MANAGEMENT  
STATE PARKS  
WATER AND LAND DEVELOPMENT

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
P. O. BOX 921  
HONOLULU, HAWAII 96808

September 22, 1967


Mr. J. C. Millar  
Napili Kai, Ltd.  
R. R. #1  
Lahaina, Maui, Hawaii

Dear Mr. Millar:

In response to your request to Mr. James Shaw, our Maui Agent, to make a footpath along the rocky shore shown on Tax Plat 4-2-02, we see no objections to your proposal. We are strongly in favor of working with land owners to enhance Hawaii's natural beauty. Accordingly, you may proceed with your proposal.

Very truly yours,

BOARD OF LAND AND NATURAL RESOURCES

  
JIM P. FERRY  
Chairman and Member

cc: Mr. James Shaw  
Mr. Tai Sung Yang

Shoreline Encroachment Napili Kai Beach Resort, Maui (2) -4-3-002:028.

5/1/86

CASE, KAY & LYNCH

ATTORNEYS AT LAW

Partnership Including Law Corporations

THE KAHULUI BUILDING  
33 LONO AVENUE, SUITE 470  
KAHULUI, MAUI, HAWAII 96732-1681  
(808) 871-8351

1ST NATIONWIDE PLAZA  
4334 RICE STREET, SUITE 202  
LIHUE, KAUAI, HAWAII 96786-1388  
(808) 245-4705

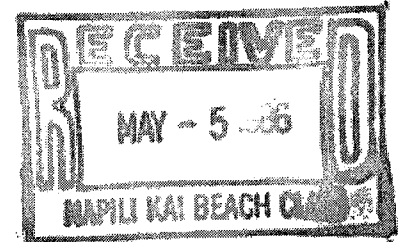
PONAHAWAI PROFESSIONAL CENTER  
275 PONAHAWAI STREET, SUITE 201  
HILO, HAWAII 96720-3028  
(808) 961-6611

KUAKINI TOWER  
75-5722 KUAKINI HIGHWAY, SUITE 203  
KAILUA-KONA, HAWAII 96740-1733  
(808) 325-4421

Mr. Millar,

The originals were  
hand delivered to Chris  
Hart today. A copy of  
all was also delivered  
to Robert Marez, Deputy  
Prosecuting Attorney,  
today as well. *Lynne*

April 22, 1986



Mr. Christopher L. Hart  
Planning Director  
County of Maui  
200 S. High Street  
Wailuku, Maui, HI 96793

Re: Request Under April 7, 1986, Letter Concerning  
Prohibitive Activities Within the Shoreline  
Setback Area and Compliance on the Same

Dear Mr. Hart:

This is in response to your letter of April 7, 1986 wherein you ask that we submit an application to your office for a Special Management Area Assessment and a request for authorization for maintenance and repair work in the shoreline setback area, such requests relating to the events which led to the maintenance and repair of a certain concrete walkway in 1972.

Please find attached an affidavit of Mr. Jack Millar concerning the establishment of the beach walkway prior to the January 1, 1970, the effective date of the Shoreline Setback law. Also attached to Mr. Millar's affidavit are series of photographs and plans relating to existence of the beach walkway prior to January 1, 1970.

EXHIBIT "B"

Letter to Chris Hart  
April 22, 1986  
Page No. 2

Please also find attached our application for Minor SMA permit with regard to the beach walkway.

Also, please accept this letter as the request of Napili Kai Ltd. for your acknowledgment of the subject beach walkway as a structure which existed prior to January 1, 1970, and your further acknowledgment that the work performed by Napili Kai Ltd. pursuant to the plans dated March 10, 1972, concerned the repair and maintenance of the subject (nonconforming) structure.

Section 13(b) of the Shoreline Setback Rules and Regulations of the County of Maui states in part that:

"Any lawful conforming or structure existing within the shoreline setback on the effective date shall be permitted."

Section 13(d) of the Shoreline Setback Rules and Regulations of the County of Maui states in part that:

"Maintenance and repair work may be done on any nonconforming structure to keep it in sound condition, or to meet the minimum standards of applicable State and County requirements and regulations. A nonconforming structure may be reconstructed, provided that reconstruction of the structures destroyed by fire, flood, wind, earthquake, or other casualty, shall be started within a period of one (1) year from it's loss, and is diligently pursued to completion; provided further that the structure shall not be enlarged or changed to another nonconforming structure."

As indicated in the affidavit of Jack Millar, attached hereto, the subject beach walkway was a structure existing within the shoreline on the effective date the Shoreline Setback legislation and the 1972 maintenance and repair work on the structure was done in order to keep the structure in a safe and sound condition.

Letter to Chris Hart  
April 22, 1986  
Page No. 3

If any further documentation on our part is necessary, please contact me immediately on the same.

Very truly yours,

CASE, KAY & LYNCH

*Paul R. Mancini*  
Paul R. Mancini

PRM:lc/1437j  
cc: Robert Maez  
Jack Millar✓

OF Counsel:  
CASE, KAY & LYNCH

PAUL R. MANCINI 1198-0  
33 Lono Avenue, Suite 470  
Kahului, Maui Hawaii 96732  
Telephone No. (808) 871-8351

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND CIRCUIT  
LAHAINA DIVISION  
STATE OF HAWAII

STATE OF HAWAII	)	LC8: 2/21/86
	)	
v.	)	AFFIDAVIT OF JACK C. MILLAR;
	)	EXHIBIT "A"
NAPILI KAI, LTD.	)	
JACK C. MILLAR,	)	
	)	
Defendant.	)	
<hr/>		
1438j	)	

AFFIDAVIT OF JACK C. MILLAR

STATE OF HAWAII	)	
	)	SS.
COUNTY OF MAUI	)	

JACK C. MILLAR, being first duly sworn upon oath  
deposes and says:

1. That he is President of Napili Kai, Ltd., and has  
been president of Napili Kai, Ltd. since September 16, 1960;

2. As President of Napili Kai, Ltd. affiant planned,  
supervised and oversaw the construction of a certain rock and

cement walkway (presently existing on Napili Kai Ltd. property and shown on Exhibit "A" attached to this affidavit), said construction took place sometime prior to 1963;

3. That in 1972 affiant planned and supervised the construction of the Napili Kai Ltd. restaurant which included certain repair and maintenance work to accessory facilities;

4. That as part of the construction of said restaurant, the referenced rock and cement walkway was to be maintained and repaired; the rock and cement walkway had suffered from erosion and flood damage and had undergone various maintenance and repair after its initial construction (approximately 1963) and was in need of maintenance and repair in 1972;

5. The rock and cement walkway was repaired in 1972 as part of the restaurant construction by pouring cement over the existing walkway and canterlieving the walkway from the adjacent retaining wall. After the completion of the 1972 work the County of Maui granted a certificate of occupancy, and certified that all work was completed in compliance with approved plans and specifications;

6. Affiant and affiant's consultants concluded in 1972 that such maintenance and repair was necessary to keep the rock and cement walkway in a sound condition and to meet reasonable safety standards concerning the same;

7. Apparently, in 1972, upon the review of the plans for Napili Kai restaurant, the Department of Public Works noted the construction work for the repair and maintenance of the concrete walkway and determined the same may require a shoreline setback variance. The notation on the 1972 plans was not communicated to the affiant or any of affiant's agents (to affiant's knowledge) or to affiant's contractor. Affiant became aware of the same in 1985 when the violation notice was issued to Napili Kai Ltd.;

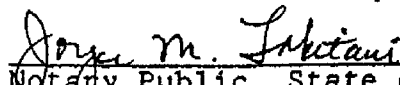
8. Affiant believes that the deletion of the walkway on the 1972 plans was a mistake by the County of Maui because the construction was mistakenly perceived to be new construction and not the repair and maintenance of the existing concrete walkway;

9. Affiant was never informed prior to 1985 that affiant was required to submit any additional documentation concerning the subject concrete walkway.

Further affiant sayeth naught.

  
JACK C. MILLAR

Subscribed and sworn to before me  
this 25th day of April, 1986.

  
Notary Public, State of Hawaii

My Commission expires: 8/16/87



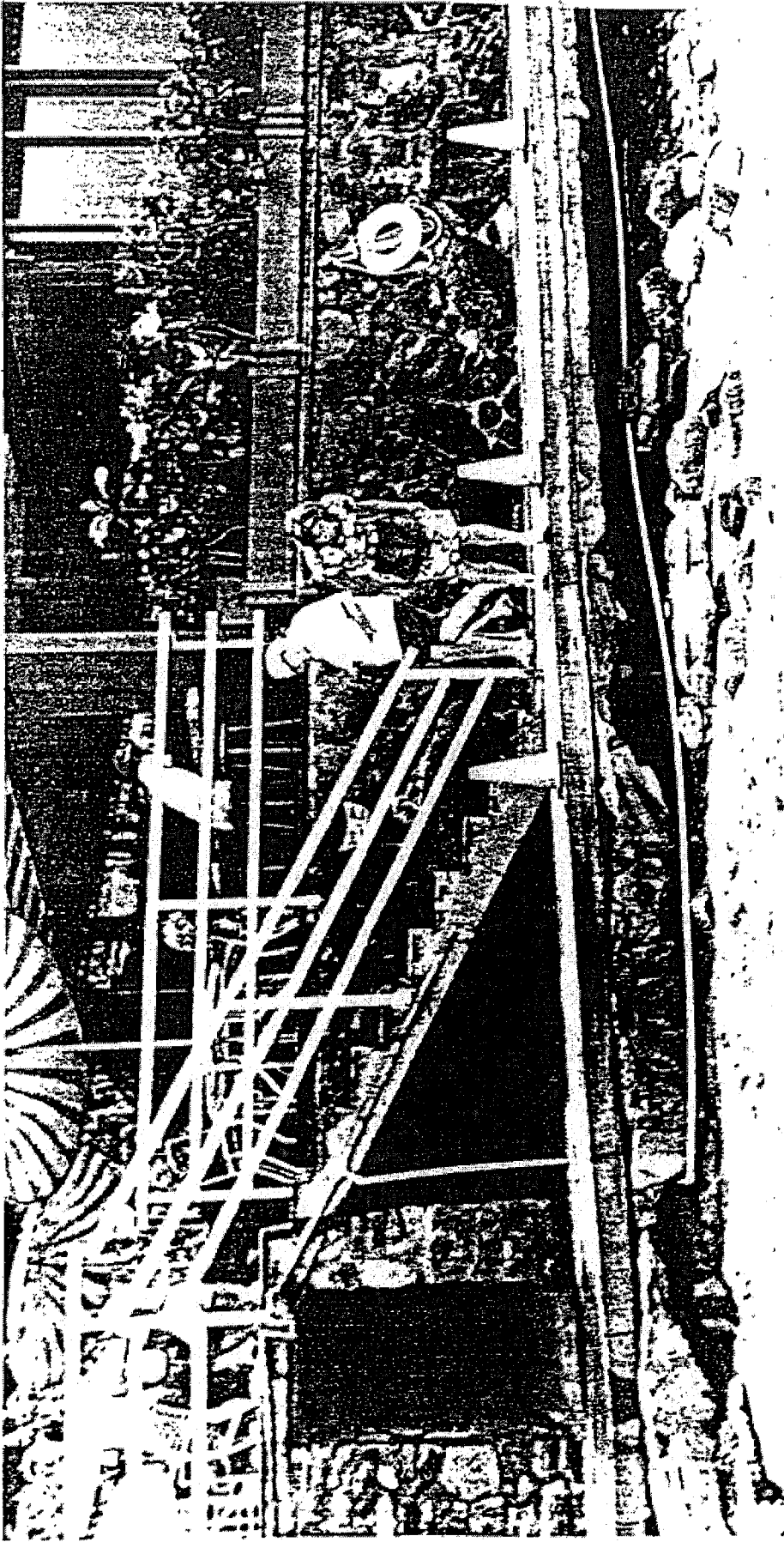
Sept '85

View shows old path...  
of rocks and cement  
under new concrete.

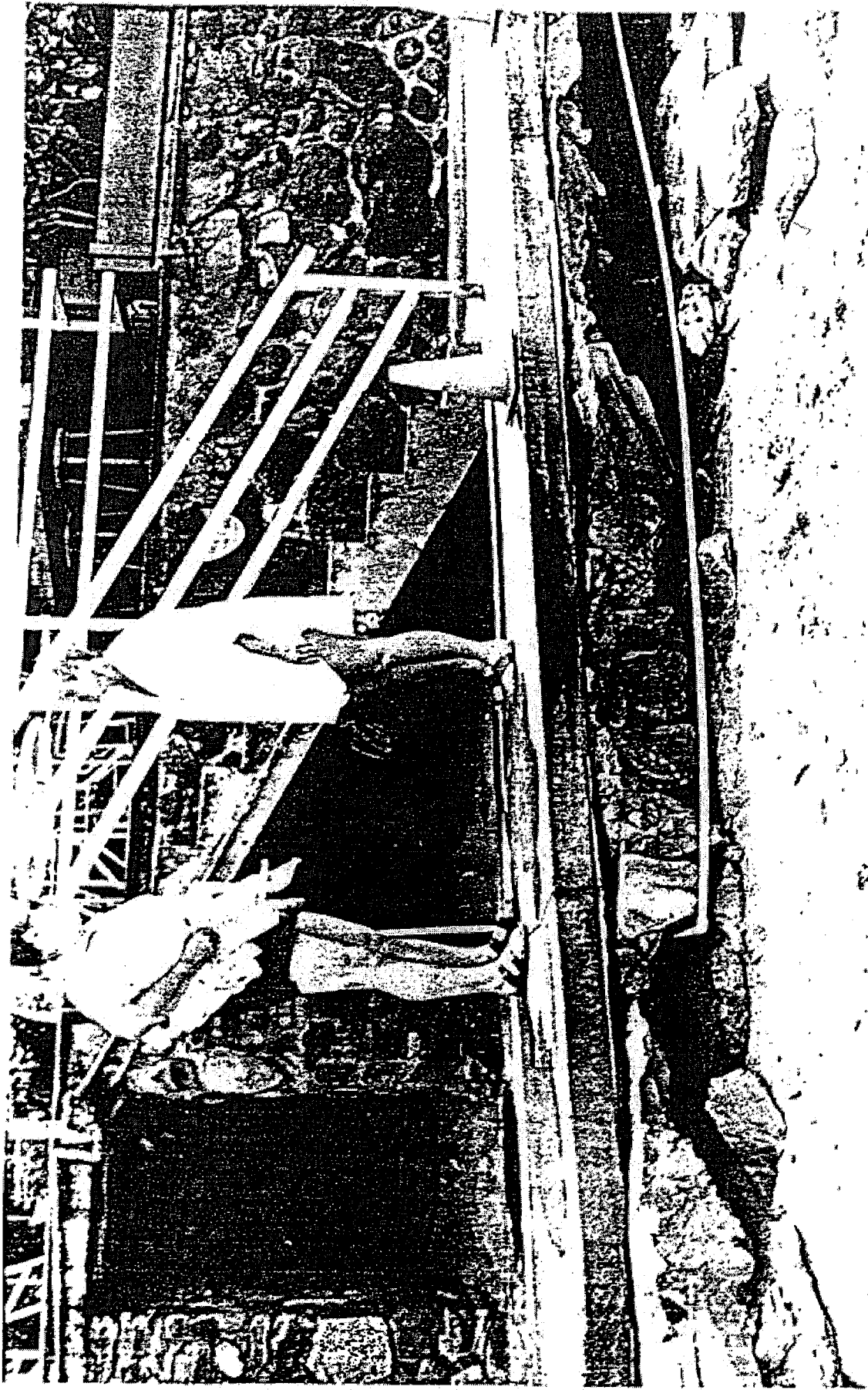
Note: sand above  
upper portion of path



20 Mar 86 EXHIBIT "A" View showing old path  
and connection to  
coastline path of

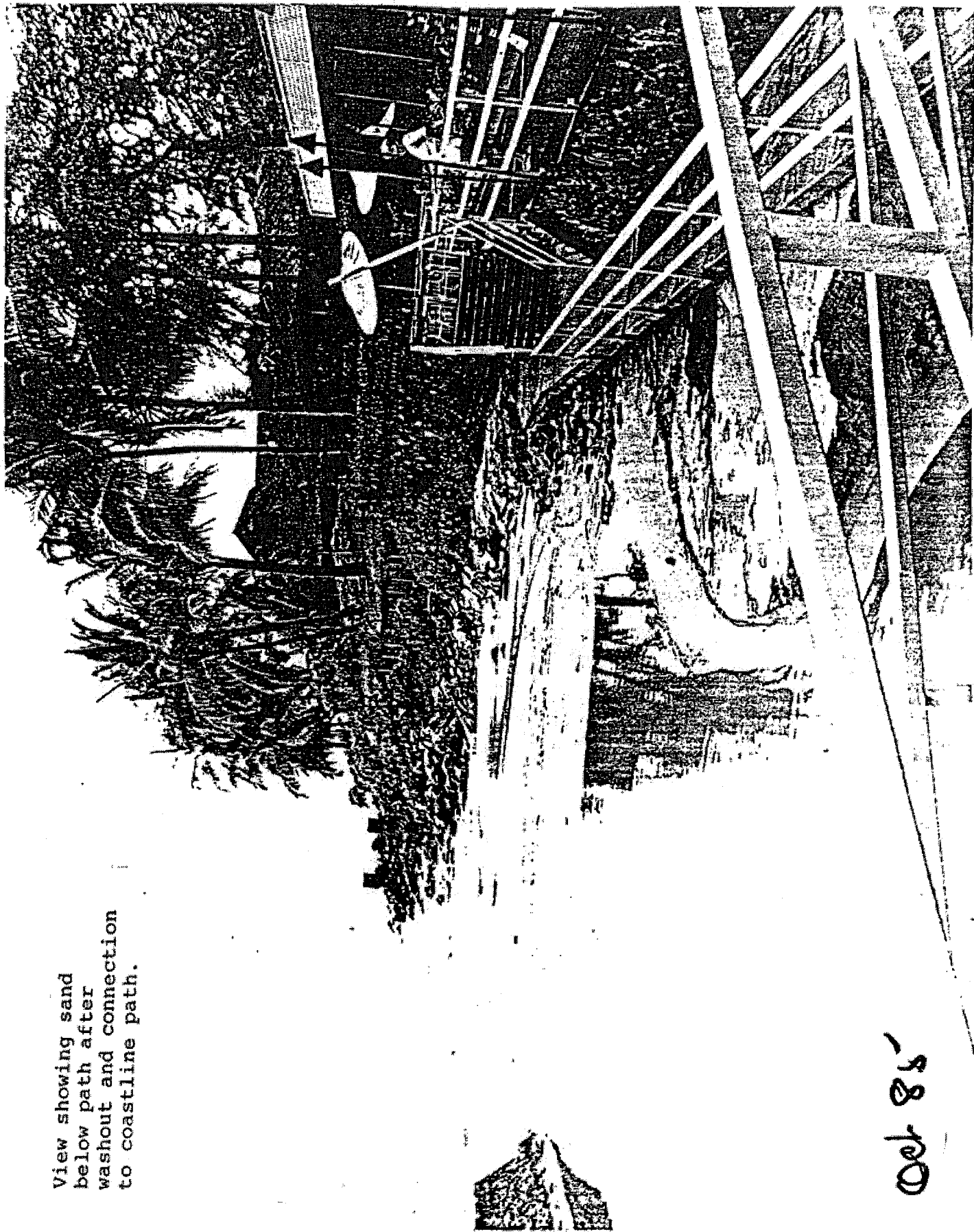


April '86

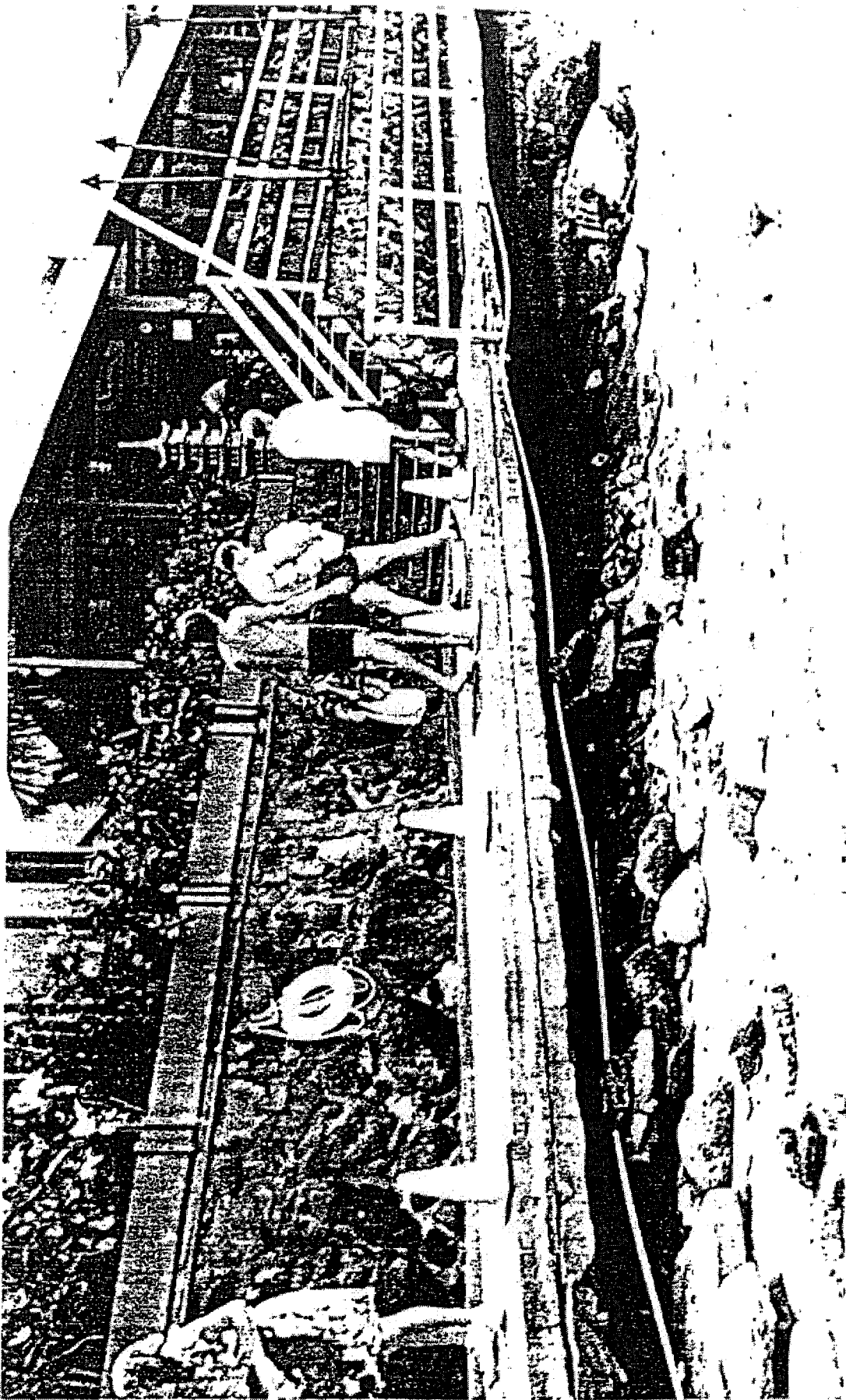


April '86

View showing sand  
below path after  
washout and connection  
to coastline path.



Oct 85



April '86

END OF EXHIBIT "A"

PAUL R. MANCINI 1198-0  
33 Lono Avenue, Suite 470  
Kahului, Maui Hawaii 96732  
Telephone No. (808) 871-8351  
Attorney for Defendant

## STATE OF HAWAII

V.

Defendant.

LC8: 2/21/86

AFFIDAVIT OF TATSUMI IMADA

AFFIDAVIT OF TATSUMI IMADA

STATE OF HAWAII

COUNTY OF MAUI

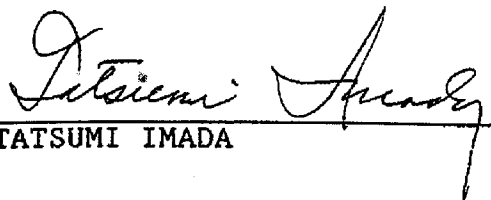
SS.

1. That he is assistant manager of Norman Saito Engineering of Wailuku, Maui, Hawaii;

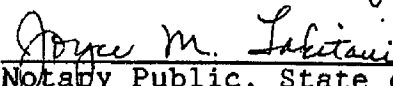
2. That he is engineer of Napili Kai, Ltd.;

3. That affiant has reviewed the sketch for the repair to approximately 45' of the stone and concrete walkway prepared for Napili Kai, Ltd. in 1972 and that in his opinion the total cost of such work, assuming 1972 costs, would not exceed \$65,000.

Further affiant sayeth naught.

  
TATSUMI IMADA

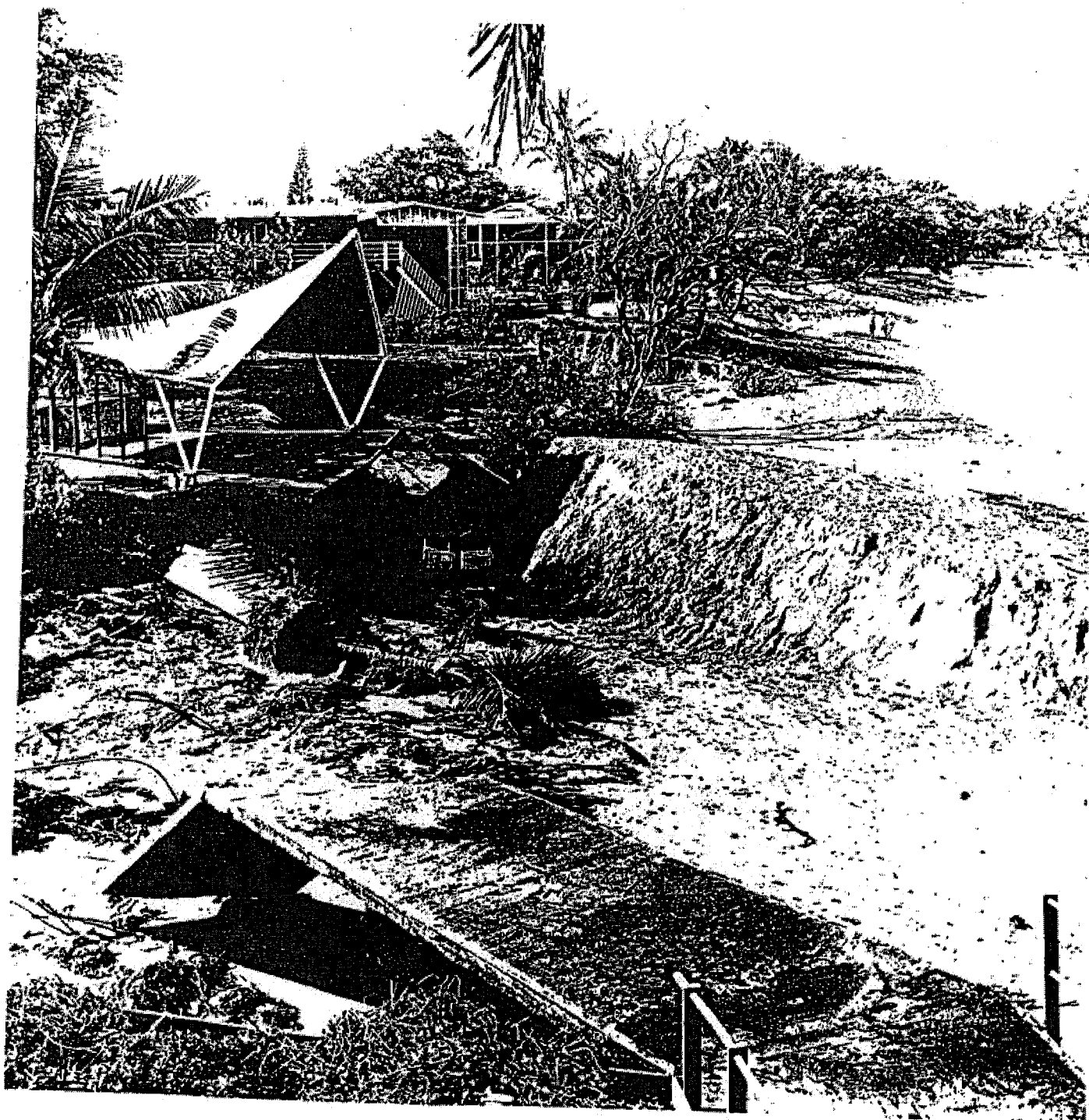
Subscribed and sworn to before me  
this 1st day of May, 1986.

  
Notary Public, State of Hawaii

My Commission expires: 8/14/87



View showing path  
around the coastline.



View showing beach erosion from  
run off water in 1964

MAUI PLANNING COMMISSION  
David T. Fukuda, Chairman  
Joseph C. Ventura, Vice Chairman  
Toshi Ansai  
Joseph Felipe  
Joseph J. Franco  
Rachael Jio  
Roy Suda  
Tom Sato  
Susumu Sakaida  
Vince Bagoyo, Jr., Ex-Officio  
Alvin Fukunaga, Ex-Officio



MAY 16 1986

HANNIBAL TAVARES  
Mayor

CHRISTOPHER L. HART  
Planning Director

RALPH N. MASUDA  
Deputy Planning Director

**COUNTY OF MAUI  
PLANNING DEPARTMENT**

200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793

May 14, 1986

Mr. Paul Mancini  
Attorney at Law  
33 Lono Avenue, Suite 470  
Kahului, HI 96732

Dear Mr. Mancini:

Re: Shoreline Setback Approval and Special Management Area Assessment/Determination for the repair and maintenance of an existing nonconforming sidewalk at the Napili Kai Hotel at TMK 4-2-02:28, Napili, Maui.

In response to your letter dated April 30, 1986, requesting a determination in accordance with the requirements of the SMA Rules and Regulations of the County of Maui relative to the above project, it is hereby determined that an SMA Minor Permit is required for the following reasons:

1. Said project is a development;
2. Said project has a valuation not in excess of \$65,000.00;
3. Said project has no significant adverse environmental or ecological effect, taking into account potential cumulative effects; and
4. Said project is consistent with the objectives, policies, and SMA guidelines set forth in the Hawaii Revised Statutes 205-A and is consistent with the County General Plan and Zoning.

Furthermore, the nonconforming sidewalk is located within the forty (40) ft. shoreline setback area and is therefore, subject to the requirements of the Shoreline Setback Rules and Regulations. Pursuant to Section 13(d) of said rules and regulations, "Maintenance and repair work may be done on any nonconforming structure to keep it in sound condition, or to meet the minimum standards of applicable State and County requirements and regulations. A nonconforming structure may be reconstructed, provided that reconstruction of the structures destroyed by fire, flood, wind, earthquake, or other casualty, shall be started within a period of one (1) year from its loss, and is diligently pursued to completion; provided further that the structure shall not be enlarged or changed to another nonconforming structure."

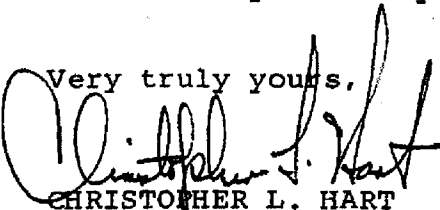
Mr. Paul Mancini  
May 14, 1986  
Page 2

In consideration of the foregoing you are hereby granted an SMA Minor Permit approval and Shoreline Setback approval, subject to the following conditions:

1. That construction shall be limited to the maintenance and repair of the existing nonconforming sidewalk. Furthermore, said structure shall not be enlarged or changed to another nonconforming structure.
2. That the approval is only for work landward of the shoreline.
3. That any and all additional proposals for work seaward of the certified shoreline shall be submitted to the State of Hawaii Department of Land and Natural Resources for appropriate review and approval.
4. That no construction, operation of equipment, storage of materials, excavation or deposition of soil or other material shall occur seaward of the aforementioned shoreline.
5. That all other Federal, State and County requirements shall be met.

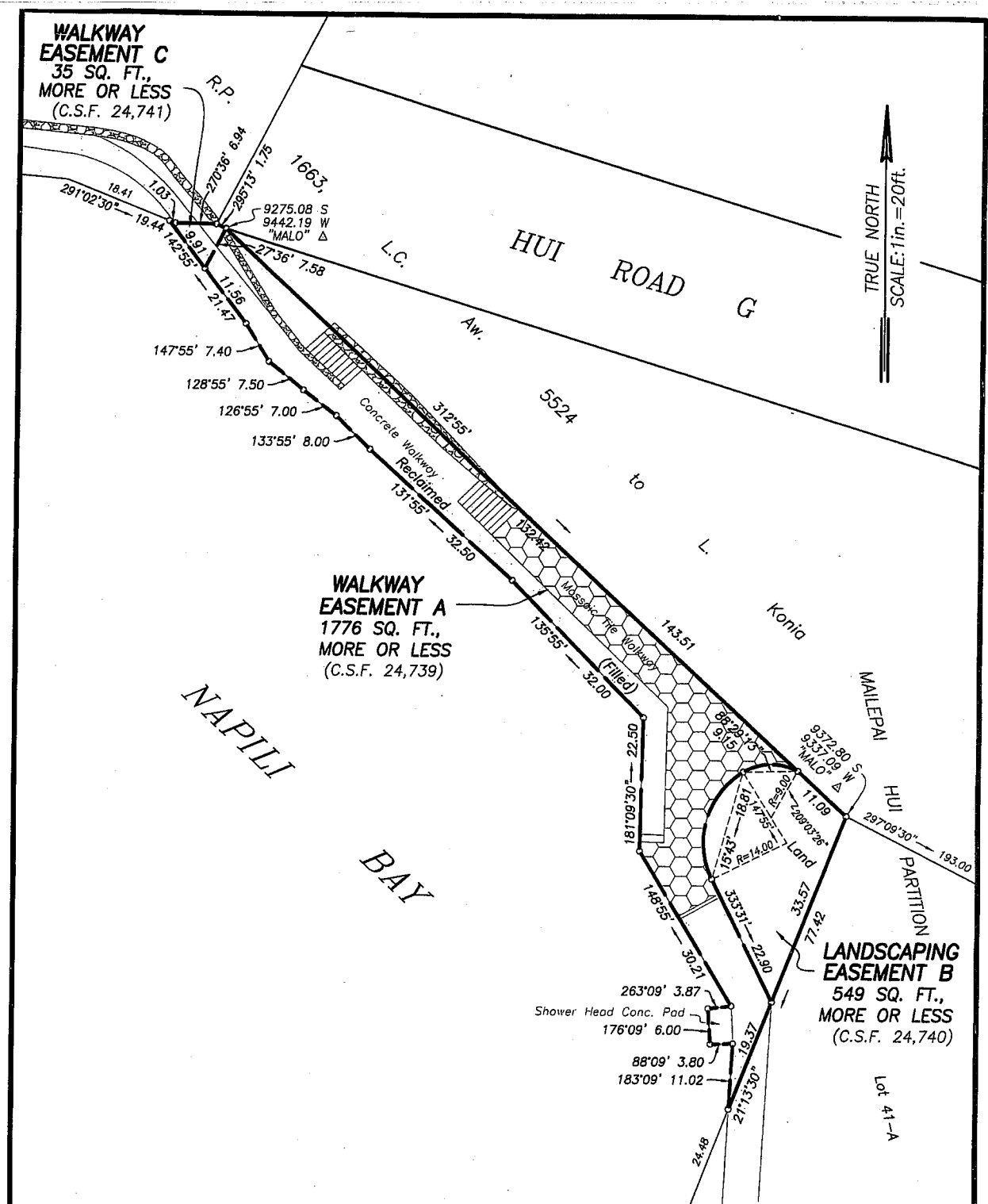
Thank you for your cooperation. If additional clarification is required please contact Ms. Colleen Suyama of my office.

Very truly yours,

  
CHRISTOPHER L. HART  
Planning Director

CS:wc

cc: LUCA - Building  
LUCA - CZM  
DLNR - Eddie Ansai  
Robert Maez - Deputy Prosecuting Attorney  
Colleen Suyama



**NON-EXCLUSIVE WALKWAY EASEMENTS A AND C  
AND  
NON-EXCLUSIVE LANDSCAPING EASEMENT B  
Fronting Mailepai Hui Partition**

Napili 2 and 3, Lahaina, Maui, Hawaii

JOB Ma-366(08)

C. BK.

Scale: 1 inch = 20 feet

TAX MAP 4-2-02 : Seaward of 4 and  
4-3-02 : Seaward of 27 & 28

SURVEY DIVISION  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
STATE OF HAWAII

C.S.F. NOS. 24,739 24,740  
24,741

JGL November 12, 2008

**EXHIBIT "C"**